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CARUCEL INVESTMENTS, L.P.

17 **UNITED STATES DISTRICT COURT**

18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 CARUCEL INVESTMENTS, L.P., a
20 Delaware limited partnership,

21 Plaintiff,

22 v.

23 NOVATEL WIRELESS, INC., a
24 Delaware corporation; VERIZON
25 COMMUNICATIONS INC., a
Delaware corporation; and CELLCO
26 PARTNERSHIP d/b/a VERIZON
WIRELESS,

27 Defendants.

28 Case No. 16-cv-0118-H-KSC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION IN
LIMINE NO. 1 TO PRECLUDE AN
ALLEGEDLY NEW
INFRINGEMENT THEORY
DISCLOSED IN THE FEBRUARY
2017 KIASALEH DECLARATION**

Hearing Date: April 3, 2017

Time: 9 A.M.

Courtroom: 15A

Judge: Hon. Marilyn L. Huff

1 The entire premise of Defendants' Motion *in Limine* No. 1 is incorrect.
 2 Carucel's technical expert, Dr. Kiasaleh, did not present substantively new
 3 testimony, opinions or theories on infringement in his February 2017 Kiasaleh
 4 Declaration (Dkt. 197 filed under seal). Everything in Dr. Kiasaleh's February
 5 2017 Declaration was timely identified in his December 2, 2016 Expert Report
 6 on Infringement ("Kiasaleh Report") (Dkt. 153-2, Ex. A filed under seal).

7 The thrust of Defendants' argument is that previously Dr. Kiasaleh only
 8 stated that the MiFi devices work in traffic, but now says they are "designed and
 9 built to operate correctly while moving in a car at speeds of the traffic" under the
 10 LTE or CDMA standards. Kiasaleh Dec., ¶¶ 20-22. But Defendants' motion
 11 misleadingly quotes only part of the relevant text from his report. Dr. Kiasaleh
 12 *always* opined that the accused devices were designed to work in traffic and
 13 comply with LTE or CDMA standards, and he expressly set forth this opinion in
 14 his report repeatedly. An expert's later declaration should not be excluded as
 15 presenting new theories or opinions if its substance is the same as the expert's
 16 original, timely disclosed report. *See Vaxiion Therapeutics, Inc. v. Foley &*
 17 *Lardner LLC*, 2008 WL 5147201 *11 (S.D. Cal. 2008) (denying motion to strike
 18 expert declaration).

19 Paragraphs 20-22 of Dr. Kiasaleh's February 2017 Declaration and the
 20 original Kiasaleh Report express the same infringement theories, facts and
 21 conclusions regarding the "adapted to/configured to" limitations, and thus, there
 22 is no basis for excluding any allegedly "new" theory of infringement contained in
 23 Kiasaleh Declaration. Specifically, the full quote from the December 2016
 24 Kiasaleh Report concerning infringement of these limitations is:¹

25
 26 ¹ The quoted portion of the Kiasaleh Report refers to only one accused product,
 27 the MiFi4510, and one asserted claim, but same substantive analysis of the
 28 "adapted to/configured to" limitation appears throughout the Kiasaleh Report for
 each accused MiFi product and relevant claim (e.g., Dkt. 153-2, Ex. A at 16-17,
 34-35, 40-41, 47-48, 61-62, 69, 77, 97, 102, 114, 120, 154, 176).

Claim 11 [of the '023 Patent]	Analysis of MiFi 4510L and MiFi 4510PP (collectively "MiFi 4510L")
An apparatus configured to move relative to Earth, the apparatus comprising:	<p>The MiFi 4510L is a portable wireless device that enables a user having a WiFi capable device (known hereafter as personal device (PD)) to <i>connect to internet via a combination of WiFi and cellular wireless technologies. The MiFi 4510 is designed to be portable and to move alongside the PD in a vehicle or other means of transportation. For these reasons, it is constructed to move with traffic at a rate of speed comparable to the traffic.</i> It can also be used in a stationary environment. The wireless connection with the PD is provided via a WiFi channel while <i>the link connecting the MiFi4510 to a cellular network of fixed base stations is compliant with either CDMA or LTE wireless standards.</i></p>  <p>Further details can be found in Carucel 9726, Carucel 9720-9807 (user guide), 9731, Carucel 9728, and Carucel 9730, 9734.</p>

Kiasaleh Report (Dkt. 153-2, Ex. A at 130) (emphasis added).

Thus, the December 2016 Kiasaleh Report timely disclosed Dr. Kiasaleh's opinion that the accused MiFi products met the "adapted to/configured to" limitation because, at a minimum, each MiFi is a portable wireless device designed to move in vehicles that allows users to connect to the Internet using WiFi and cellular wireless technologies, where the link connecting the MiFi to a cellular network of fixed base stations is compliant with either CDMA or LTE

1 wireless standards. This is the *same* substantive theory of infringement and facts
 2 that Dr. Kiasaleh expressed in paragraphs 20-22 his February 2017 Declaration.

3 Moreover, the point is far from controversial. Novatel's former Chief
 4 Technology Officer testified extensively that the devices were designed to work
 5 in traffic, as the Court noted in denying Defendants' summary judgment motion:

6 In his testimony, Dr. Souissi describes the designing and testing that
 7 was undertaken to ensure that the accused products could operate while
 8 traveling in moving vehicles. (See Doc. No. 202-1, Sarnecky Decl. Ex.
 9 3.) For example, in response to the question, “[The accused products]
 10 were designed to move in vehicles; is that correct?,” Dr. Souissi
 11 responded: “Are you serious? Of course.” (Id. at 126:1-4.) Shortly
 12 thereafter, Dr. Souissi testified regarding the testing of the accused
 13 products: “We spent three months doing [tests]. . . . We’re moving in
 14 every possible traffic, every possible neighborhood; busy, downtown,
 15 suburban, rural. I bet you maybe we’ve done millions of miles testing
 16 MiFis. . . . At different speeds.” (Id. at 126:10-18.) Plaintiff has also
 17 presented the Court with documents corroborating Dr. Souissi’s
 18 testimony regarding the roadway testing of the accused products. (Doc.
 19 No. 202-1, Sarnecky Decl. Exs. 5, 6.)
 20 Dkt. 226, at 7-8.

21 Defendant’s motion *in limine* really represents one more attempt of to
 22 revisit the motion they lost. Dr. Kiasaleh did not present any new theories, and
 23 under the proper claim construction, this limitation should not even be in dispute.
 24 Moreover, in substantive sense, this motion is immaterial, because the Court has
 25 already ruled based on Dr. Kiasaleh’s report that the evidence was sufficient to
 26 present to the jury. (Dkt. 226.)
 27

28 In view of the foregoing, Carucel respectfully requests that the Court deny
 29 Defendants’ Motion *in Limine* No. 1.

30 Dated: March 20, 2017

/s/ Robert Harkins

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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that all counsel of record who are deemed
3 to have consented to electronic service are being served this 20th day of March,
4 2017, with a copy of this document via the Court's EM/ECF system. Any other
5 counsel of record will be served by electronic mail, facsimile and/or first class
6 mail on the same date.

7 */s/ Robert Harkins*

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